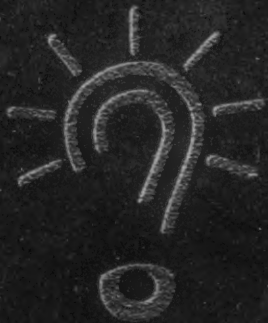
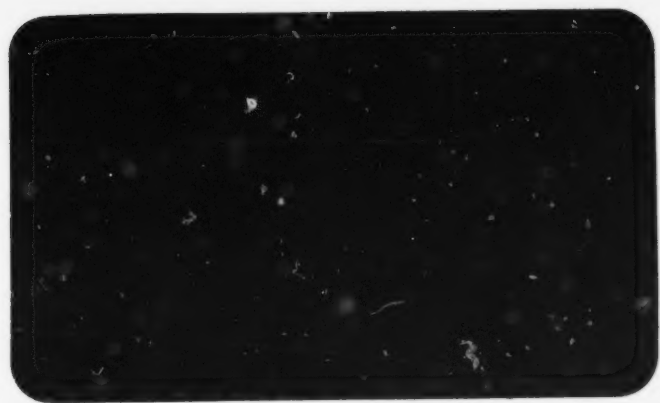


**Close Personal Relationships
between Adults: 100 Years of
Marriage in Canada**

By: Katherine Arnup



LAW COMMISSION OF CANADA
COMMISSION DU DROIT DU CANADA



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BIOGRAPHICAL NOTE

Katherine Arnup is an historian who has published extensively on the history of motherhood and the family in Canada. She is the author of *Education for Motherhood: Advice for Mothers in Twentieth Century Canada* (Toronto: University of Toronto Press, 1994), the editor of *Lesbian Parenting: Living with Pride and Prejudice* (gynergy, 1995), and co-editor of *Delivering Motherhood* (Routledge, 1990). She has published a number of articles on contemporary and historical issues of child custody. She is an Associate Professor in the School of Canadian Studies at Carleton University.



EXECUTIVE SUMMARY

In recent decades, marriage and the family have become especially contested terrain in Canada and throughout most Western nations. Concerns over the fate of the family have led some observers to call for greater restrictions on access to divorce and a narrowing of access to the benefits and responsibilities associated with marriage. At the same time, other groups, most notably lesbian and gay couples, have lobbied for the right to marry, claiming their exclusion from marriage as the last remaining obstacle to full legal and social equality.

Beneath many of these debates lies an assumption that marriage and the family have no history. As this paper documents, there have in fact been enormous changes in the family over the past two centuries. From the large, multi-generational, rural-based households of pioneer days to the smaller, nuclear, dual- and single-parent families of today, families -- and the relationships within them -- have changed in size, membership, and function throughout history. Furthermore, at numerous points in history, observers from a range of constituencies have expressed consternation about these changes, arguing that they represented a "crisis" which threatened the very foundation of society. The author argues that current debates, far from being unique to late 20th and early 21st centuries, are in fact part of an ongoing process of historical change.

This paper documents the history of marriage and the family, focussing on two key historical periods: the late nineteenth and early twentieth centuries, and the late 1960s and to the year 2000. For each period, the author examines marriage and property laws; motherhood (including child custody and access and the treatment of single motherhood and children "born out of wedlock") and divorce. The paper demonstrates that, during the first period, marriage

remained a largely patriarchal institution. Despite feminist efforts to reform married women's property acts, most married women remained financially vulnerable, largely dependent upon the income and resources of their husbands. Prior to the passage of the *Divorce Act* in 1968, divorce was difficult to obtain, and in a number of provinces could only be obtained through a private act of Parliament. Women were assured of neither child support nor alimony following divorce. Children born outside of marriage were deemed to be "illegitimate," and mother and children alike were subject to social stigma and harsh financial penalties. Finally, lesbian and gay relationships, as well as inter-racial and common-law heterosexual relationships remained subject to social sanction and disapproval. All of these mechanisms served to reinforce the heterosexual nuclear family and to render alternatives to this family form virtually inconceivable.

Major changes in both the legal regulation and the composition of the family began to take place in the 1960s. As increasing numbers of women sought employment in the paid labour force, the male breadwinner family was gradually replaced by the dual-income family as the predominant family form. Single-parent families, lesbian and gay families, common-law heterosexual couples both with and without children, and multi-generational families are all part of the changing landscape of the Canadian family.

The passage of the first federal *Divorce Act* in 1968 gave Canadians across the country access to judicial divorce. Further revisions to the *Divorce Act* in 1985 reduced the adversarial nature of the process and provided mechanisms for the equitable division of property and the provision of child support. These changes enabled many couples who had been living apart to legally sever their relationships. In addition, couples for whom the adversarial process and recourse to matrimonial offenses were unacceptable, could now access "no fault" divorce provisions. As a result of these legislative changes, the divorce rate in Canada rose steadily,

reaching its peak in 1987. At present, approximately one in three marriages in Canada ends in divorce, in contrast to the rate of one in two marriages in the United States.

Major demographic changes have taken place during the past three decades. Increasing numbers of Canadians -- both heterosexual and lesbian and gay -- have chosen to live in common-law relationships. Many of these couples choose to have children and to raise them within their families. Despite these changes, most Canadians still marry and a significant percentage of those who divorce remarry. The author concludes that, despite the massive social and legal changes that have taken place during the past three decades, the family -- in all its variety and diversity -- remains a vital and fundamental institution in the lives of Canadians.

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I. Introduction

Thank God the people of Canada know how to estimate and do value and cherish the sacred character of the matrimonial tie, the purity and sacredness of the family - they know these sentiments - attribute of the higher law - are the source and life of Christian civilization and without them no nation can permanently prosper.¹

Senator Robert Gowan, 1888

Where will this country come to in twenty-five years if we are going to grant divorces simply because some woman has been disappointed in regard to her husband, and comes here and asks for a dissolution of her marriage because she made a mistake when she married? The whole social fabric of the country would go to pieces.

We may build all the Grand Trunk Pacifics we like, we may debate free trade or protection, we may grant autonomy to all the provinces from Vancouver to Halifax, we may pass all the laws on a business basis we like, but if we interfere unnecessarily or recklessly in the relations between man and wife, we will go a long way towards undermining the morality of this country, and if our laws tend to produce such a result and break up homes we had better repeal them and build up a system of laws more suited to a sound condition of public and private morality.²

E.A. Lancaster, Conservative MP, for Lincoln Ontario, 1905

Upon the stability of the family more than on anything else the welfare of the nation depends.³

Canadian Youth Commission, 1948

From all sides we hear laments about the family. It is suggested that the importance of family life is gradually dwindling, that the family is no longer discharging the duties or accepting the responsibilities which properly belong to it.⁴

Canadian Youth Commission, 1948

In recent decades, marriage and the family have become especially contested terrain in Canada, and, indeed, throughout most Western nations. Concerns over the "crisis" in the family have compelled some observers to call for greater restrictions on access to divorce and a narrowing of access to the benefits and responsibilities associated with marriage. At the same time, other groups, most notably lesbian and gay couples, have lobbied for the right to marry, claiming their exclusion from marriage as the last remaining obstacle to full legal and social

equality. To understand these developments and the debates that surround them, we must examine closely the history and evolution of marriage in Canada. In addition, we must place the changing history of marriage within the broader contexts of changes within the family, society, and the economy.

Within contemporary debates over the family, there is often a tacit assumption that marriage and the family have no history, that they are transhistorical, unchanging phenomena. Such a view of social evolution holds that there is only one "real" family form -- the nuclear family comprised of a husband, his wife, and their children -- and that all other family forms, be they single parents, extended kin networks, or lesbian and gay couples, represent a threat to the integrity and continued strength of the heterosexual nuclear family.

In fact, enormous changes have occurred in the family over the past two centuries, changes so profound that many scholars place the term "the family" in quotation marks to denote the fact that there is not now and never has been one family form. From the large, multi-generational, rural-based families of the pioneer days to the smaller, nuclear, dual- and single-parent households of today, families have changed in size, membership, and function throughout history. Furthermore, at numerous points in history, observers from a range of constituencies have expressed consternation about these changes, arguing that they represented a "crisis" which threatened the very foundation of the family. Current debates, then, far from being unique to late 20th and early 21st centuries, are in fact part of an ongoing process of historical change.

This paper will document the history of marriage and the family by focussing on two historical periods: first, the late nineteenth and early twentieth centuries and, second, the late 1960s and to the year 2000. I have chosen these two historical periods as "windows" because

they were times of marked social and legal change. For each period, I will examine the following issues: marriage; property laws; divorce; and motherhood (including child custody and access, as well as the treatment of single motherhood and children "born out of wedlock"). In the process, I will trace the dramatic shift that has taken place over the course of the 20th Century as marriage has been transformed from a patriarchal institution to a relationship that in many respects more closely resembles a partnership of equals.

II. Forming a Nation of Families: 19th and Early 20th Century Canada

Within debates over the fate of the family, marriage holds special significance, at once both sacred and romantic, both social and intensely private. Throughout the history of Canadian settlement and development, marriage was without question the most privileged and highly regarded relationship between men and women. As historian James Snell notes, "[a]s the legal cornerstone of the home and family, marriage was a basic means by which the state might influence the character of and conduct in the home."⁵ In early 20th Century Canada "[m]arriage was inseparable from the ideal of the family and was seen to be equally at the heart of Canadian society. It was, wrote G. S. Holmsted, a Toronto lawyer, 'the very foundation of civilized society.'"⁶ Sexual relations, pregnancy, and child-rearing were only acceptable within the bounds of marriage. Numerous rewards and benefits were showered upon those who embraced heterosexual marriage and family life. Numerous penalties, including ostracism by church and community, awaited those who strayed.

More significant, perhaps, than the sheer force of rewards and sanctions, however, is the power these had to make alternatives to marriage unimaginable. As R.W. Gordon has

noted: "The power exerted by a legal regime consists less in the force it can bring to bear upon violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live."⁷

The special status accorded to marriage was not restricted to the realm of ideas. Calling the heterosexual nuclear family form that came to predominate in the late 19th and early 20th centuries "the conjugal family," Snell notes, "The ideal of the conjugal family was far more than an ideological construct. It was sustained by - indeed, it was a product of - both economic structures and dominant political relations."⁸ "Sustained by the state, the churches, and public opinion, marriage was the bulwark of the social order."⁹

Within marriage, the roles for men and women were clearly prescribed under the doctrine of coverture. As William Blackstone, the famous 18th Century commentator on the laws of England, observed: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything."¹⁰ The husband's role was as provider and protector. In exchange, the wife was responsible for sustaining the marriage. As James Snell explains, "[h]er charge was the marital home, and she alone had the obligation to make it (and thus the marriage itself) happy and comfortable." Accordingly, "the primary responsibility for a failed marriage ... was the wife's."¹¹

Prior to the 20th Century, marriage was not only deeply rooted in both religious and legal traditions, but it was also grounded to a great extent in an interdependence between men and women. Within the family economy that characterized most Western societies prior to industrialization, men and women depended upon the economic partnership provided within the

context of marriage and the family. In 19th and early 20th century Canada, for example, neither male nor female settlers could survive on their own without great difficulty. Farmers required wives to bear children and to feed, clothe, and care for the family. Cases of a widower seeking a new wife shortly after his former wife's death abound in the historical record.¹² For women, lacking legal rights and access to employment, marriage provided the only alternative to spinsterhood or a life in the church. To describe this relationship as an interdependent one is not, of course, to claim that marriage was a partnership of equals. As I will document, much of marriage law was rooted in patriarchal ideas and regulations, with women abdicating virtually all of their rights to property and personhood in exchange for the "protection" of marriage.

With the advent of industrialization, and the shift from a predominantly rural to an urban society, the interdependence between husbands and wives underwent certain changes. The shift from domestic to industrial production, for example, meant that many of the tasks traditionally performed by women moved from the home to the factory. Beginning first in cities and gradually expanding to towns and villages, stores distributing a host of mass-produced goods began to proliferate. "Store-bought" products, ranging from soap and bread to dresses and canned goods, soon replaced the "home-made" versions for families able to afford the additional expense. As historians have documented, however, this shift did not result in a reduction of women's labour, as the tasks of motherhood expanded to fill women's available time. Despite these changes, a gendered division of labour, supported by the biological facts of pregnancy, childbearing, and lactation, in addition to high rates of infant and maternal mortality, kept many women occupied with the tasks of motherhood, while men assumed the role of breadwinner. Although for many poor and working class families this division of labour remained more of a fiction than a reality, nonetheless legal restrictions coupled with health and fertility factors served to reinforce women's dependence upon their husbands' incomes until well into the 20th century.

To support and sustain this gendered division of labour within the conjugal family, countless policies and laws were enacted. As James Snell notes, "Policy after policy conceived of adult men and women as living in an idealized family, and treated that family status as something to be encouraged and maintained."¹³ These policies were two pronged: they were designed both to encourage men and women to enter into (and remain within) conjugal units, and to punish those who lived outside of them.

In the following sections of this paper, I will consider five areas in which laws and social policies have served to sustain and reinforce the conjugal family: marriage; property; divorce; child custody and access; and the treatment of single mothers and illegitimate children. Although the mandate of this paper is to examine the history of marriage in the 20th Century, such an examination must begin in the 19th Century, for many developments have their roots in the "long century."¹⁴ This is particularly true for Canada, a nation to which both industrialization and nationhood came comparatively late. Many of the fundamental Canadian laws with respect to marriage and the family were enacted during the 19th Century, and remained largely unchanged until the late 1960s. I will begin, then, in the 19th Century.

A. Marriage Laws and Practices

1. Jurisdiction

Under the *Constitution Act*, 1867 (U.K.), Parliament was granted "exclusive legislative jurisdiction over 'marriage and divorce'."¹⁵ This stands in contrast to the United States, where marriage and divorce were state responsibilities. Section 92(12) of the *Constitution Act*, 1867 (U.K.) granted provincial legislatures the authority to enact laws on the "solemnization of marriage in the province."¹⁶ Despite its jurisdiction over marriage and divorce, the federal

government did not exercise this authority in any substantive way until the passage of the *Divorce Act* in 1968.

2. The role of religion

Throughout Canadian history, religion has been intimately intertwined with marriage law and practice. In earlier times, religion was a much greater force in people's lives: virtually every citizen had a religious affiliation and churches enjoyed much higher rates of attendance. In smaller communities, churches often formed the core of the community, providing much needed social services and a watchful eye against misdemeanours and immoral behaviour. As well, legislation granted church officials the power to officiate at marriage ceremonies. Initially restricted in English Canada to ministers of the Anglican Church, the right to solemnize marriage was eventually extended to other faith groups. An exception to that rule was made for officials of the Roman Catholic Church, whose right to solemnize marriages was protected in the *Articles of Capitulation* (1760). [For more, see Marriage Laws, below.]

The fundamental rules of marriage were rooted in religious doctrine. As historian Peter Ward notes: "Christian dogma held marriage to be permanent, exclusive, and sacred, and insisted that eroticism be limited to the married state. In nineteenth-century Canada all Christian denominations occupied this same doctrinal ground." Although they differed on some points of teaching, they all agreed on the importance of "the safekeeping of Christian principles of marriage and sexual life."¹⁷ Marriage was also an exclusively heterosexual institution. As Lord Penzance explained in an oft-cited 1866 British divorce proceeding: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."¹⁸

In Quebec, marriage traditions were rooted in the legal traditions of France and in Roman Catholic traditions and rites. The free exercise of the Roman Catholic religion had been guaranteed under the *Articles of Capitulation* (1760), the *Quebec Act* (1774), and the *Constitution Act* (1791). While the Church actively discouraged marriages between Catholics and non-Catholics ("mixed marriages"), authority to solemnize marriages between members of their own faith was granted to Anglican ministers in Quebec in 1795. That right was eventually extended to other religious denominations as well.¹⁹

In Quebec, the Roman Catholic Church was a powerful and "omnipresent" force. As historian Andr  e L  vesque has noted, "[i]n a society where the relationship between Church and state was very close, where church attendance was very high, regardless of social class, gender, or geographical region, and where a single religion claimed the adherence of an entire population, the Catholic Church emerged as the primary normative agency." The Church maintained its position as "the interpreter of good and evil" and "arbiter of what behaviour was approved and what was condemned" until the Quiet Revolution of the 1960s.²⁰

3. Marriage laws and exclusions

Outside of Quebec, marriage law was based on a combination of English common law and two key English statutes.²¹ The first was a statute passed under Henry VIII, which created "two main grounds for annulling marriages: civil and canonical. Civil prohibitions included infancy, want of reason, lack of free consent, or a previous marriage. Canonical constraints consisted of disabilities such as impotence, consanguinity, and affinity."²² The second statute was *Lord Hardwicke's Act* of 1753,²³ which "made religious ceremonies compulsory, and fixed formal requirements such as parental consent, registration, and published banns for all legal unions."²⁴ Only ministers of the Church of England were allowed to solemnize legally recognized

and state sanctioned marriages. To prevent clandestine marriages, banns had to be published on three Sundays preceding the solemnization of the marriage.²⁵

Upper Canada passed its first *Marriage Act* in 1793. The legislation merely confirmed those Anglican marriages that had taken place prior to 1792 and had been contracted in an "irregular manner" by someone other than an ordained minister of the Church of England because of the frontier conditions. The question of whether non-Anglican religious officials would be allowed to solemnize valid marriages among their members was an ongoing issue in all those jurisdictions that had adopted *Lord Hardwicke's Act* (which restricted the solemnization of marriage to Anglican ministers).²⁶

The parade of marriage cases in Upper Canada (Canada West/Ontario) reveals both the persistence and importance of this debate. In 1798, after considerable pressure from other religious denominations, the colonial legislature ratified legislation which allowed ordained Presbyterian, Lutheran and Calvinist ministers to celebrate marriages among their adherents. In order to qualify, however, these ministers had to undergo a certification procedure that members of the Church of England did not. Methodists, viewed with suspicion because of their republican sentiments, were explicitly excluded from the legislation. Methodists continued to lobby for the right to solemnize marriages, and, in 1829, legislation was passed which allowed ordained Congregationalist, Baptist, Independent, Mennonite, Tunker, Moravian, and Methodist ministers to perform marriages among their members.²⁷ Such ministers still had to undergo legal certification and take an oath of allegiance, requirements not set for Anglican Ministers. Under continued pressure from various religious denominations, the right to solemnize marriages was extended to ordained ministers of all Christian denominations, provided they took an oath of allegiance and verified their credentials.²⁸ Finally, in 1857, that right was extended to ordained ministers of "every religious denomination in Upper Canada" including Jewish rabbis, in

accordance with their own "rites, ceremonies and usages." No certification process was required.²⁹

With the passage of the 1857 amendments to marriage solemnization laws in Upper Canada, provincial legislators turned their attention towards providing greater scrutiny of and stricter penalties for unauthorized marriages. The successive marriage acts can only be understood if one recognizes that civil marriages did not exist in Ontario (or in many other provinces) until 1950. As Annalee Lepp explains, "[f]rom the perspective of the state ... since marriage was not only defined as a religious, but also a civil contract which determined such matters as private conjugal rights, family succession, and the disposition of property, it was necessary to subject religious officials to some form of legal regulation." In Ontario, Lepp notes, "the state's regulatory impulse tended to shift away from attempts to restrict who could celebrate marriages based strictly on religious allegiances toward establishing legal mechanisms designed to prevent the constitution of pretended, illegal, and indeed defective marriage contracts."³⁰

Marital exclusions -- that is, the identification of those individuals and couples who were prohibited from marrying -- formed a crucial part of marital law in the 19th and 20th centuries. Marital exclusions were designed to prevent "undesirable marriages" from taking place.³¹ In a nation that steadfastly resisted the implementation of judicial divorce, prevention was a key factor in ensuring the stability of marriage. In times of perceived social crises, marital exclusions were hotly contested and expanded. For example, historians James Snell and Cynthia Comacchio Abeele document the growth of a movement to tighten restrictions on marriage that developed in the early 20th Century.³² Because of the massive social changes wrought by industrialization, urbanization, and immigration, concern grew about "the stability and traditional character of marriage."³³ Youthful marriages, the spread of disease (and in particular, VD) and

reproduction among "degenerates" and the "unfit" led to calls for parental consent for marriage (if under 21) as well as for premarital education, testing, and assessment. "Marriage was to become a privilege for those elements in society who demonstrated the features most desired in the future Canada: genetic quality, emotional and mental stability, good health, maturity."³⁴ These efforts met with considerable success, as provincial legislatures raised the minimum age of marriage (e.g. Saskatchewan, to 15; Alberta, to 16) and required parental consent prior to age twenty-one.³⁵ Despite considerable support for legislation that would require couples to obtain a health certificate certifying that they were free of venereal disease, no such law was ever passed in Canada. As Snell and Abeele note, many people objected to further regulation of marriage on the grounds that "[e]ven the unimproved marital state was distinctly preferable to the unregulated sexuality that fell outside prescribed middle-class social behaviour."³⁶ Legislators were thus "caught between a desire to improve the quality of marriage and a two-fold concern that its basic character not be altered and that restrictions not be so great as to encourage extramarital relationships."³⁷ Although the British Columbia government in 1938 did make blood tests for venereal disease mandatory for couples prior to marriage, authorities soon discovered that the province lacked sufficient facilities to enforce the regulation, and, as a result, that portion of the legislation was never proclaimed.³⁸

Numerous examples exist of state authorities' efforts to regulate, and, at times, prohibit marriages of so-called mixed-race couples. Of particular concern were marriages between First Nations' women and Euro-Canadian men. Marriages "à la façon du pays" [according to the custom of the country] between First Nations women and fur traders provided important trading links during the 18th and early 19th centuries. Aboriginal women served as guides and translators, wives and partners, for both French and British fur traders. While both Indian agents and Christian missionaries "strenuously objected" to the ongoing existence of First Nations' "customary marriage practices outside the church,"³⁹ prior to the 20th Century judges and other

officials tended to accept such marriages, extending legitimacy and inheritance rights to the children born into these unions. Despite this "equivocal legal toleration of Aboriginal marriage rites," state and religious officials nonetheless continued to press for the extension of Christian marriage rites to reserves and to encourage the work of Christian missionaries among Aboriginal peoples.

By the mid-19th century, as agriculture began to replace the fur trade in economic importance, European husbands began to abandon their Aboriginal wives and children in favour of British or French wives. Furthermore, church and state officials began to place increasing emphasis on Protestant or Roman Catholic marriage rites, attempted to stamp out "barbaric" and "pagan" practice, and to force monogamous, patriarchal marriage upon Aboriginal peoples.⁴⁰

With the passage of the *Indian Act* in 1869, First Nations' women were dealt a further blow to their rights. Section 12(1)(b) of the Act determined that any First Nations woman who married a non-First Nations man lost her "Indian status." The effect of this regulation was that both the wife and her descendants lost their entitlement to land, housing, and all other benefits that Indian status provided. This loss was permanent, even if the marriage ended in desertion or divorce. This discriminatory practice remained in place until 1985. For decades Aboriginal women challenged the provision of the *Indian Act* that gave status to white wives and mixed-race children of male Indians but took that status away from Indian women and their children if they married a non-status man. Only with the passage of Bill C-31 in 1985 did the federal government revise the *Indian Act*, removing the discriminatory clauses. Even then, however, those women who were reinstated were not guaranteed their rights, and their children could not pass their Indian status on to their offspring.

The 19th and 20th centuries witnessed similar denunciations of marriages between white and non-white populations. Of gravest concern were liaisons between white women and black or Asian men. While Canada had no formal laws against inter-racial marriage, state authorities found numerous other means, ranging from deportation to charges of seduction, to prevent such "unnatural" unions. Often, simply denying an inter-racial couple access to marriage rites was sufficient. Lepp described the efforts of an American couple, living in Sarnia, Ontario, who attempted to marry in 1913. The would-be bride (a "white girl") allegedly remarked to the immigration authority, before being deported, "I thought ... that marriage between negroes and whites was quite common in Canada." The newspaper account cited the immigration official as responding, "I think you will find that you are very much mistaken."⁴¹

Communities also devised ways to punish those couples who attempted to breach the colour bar. Through the use of charivaris - community events designed to enforce "community behavioral norms, moral codes, and marital customs through shaming or punishment" - would-be husbands were tortured and sometimes even murdered in order to prevent a mixed-race marriage.⁴²

Similar efforts were made to discourage the formation of families within the Chinese Canadian population and to prevent marriages between Chinese men and white women. The imposition of the head tax on Chinese immigrants in 1886 effectively prevented Chinese men from bringing their wives or prospective brides and prevented single Chinese women from immigrating to Canada. In 1923, the *Chinese Immigration Act* (the Exclusion Act) prohibited Chinese immigrants from entering Canada. As a result, many wives and children were unable to join their husbands and fathers in Canada. These regulations were designed to prevent the establishment of permanent Chinese Canadian settlements in Canada. To prevent marriages between Chinese men and white women, legislators in Ontario, Manitoba, Saskatchewan and

British Columbia passed laws making it illegal to hire White women in Chinese-owned laundries and restaurants. All of these efforts were designed to exclude Asian immigrants from establishing permanent settlements in Canada.⁴³

The issue of civil versus religious marriages was a contentious one in the early and middle decades of the 20th Century. While three western provinces had made provisions for civil marriage for some time (B.C., 1888; Northwest Territories; 1898, Manitoba, 1932)⁴⁴, Ontario did not pass legislation authorizing civil marriage until 1950; the remaining provinces would wait until the 1960s and 1970s to pass similar legislation (Quebec, 1968; Nova Scotia, 1962; N.B. 1963; PEI: 1969; Nfld, 1974).⁴⁵

B. Property Laws

Property laws were one of the key legal mechanisms for ensuring the stability of the conjugal family.⁴⁶ As I have already noted, under doctrine of coverture, a wife's "legal identity was obliterated at marriage and she was entirely under the power and control of her husband."⁴⁷ Married women were unable to manage or dispose of property, or to control any wages they might earn. While a married woman did not actually lose ownership of her property, "she did forfeit her authority to manage the property or receive the rents and profits from it - all of which flowed by right to her husband during the marriage."⁴⁸ As Lori Chambers notes, "marriage, for women, represented civil death."⁴⁹ Thus, married women were rendered entirely dependent upon their husbands, unable to leave even the most abusive or violent marriage.⁵⁰

It is not surprising, then, that reform of the married women's property acts joined the struggle for the vote as a key focus of feminist organizing in Canada and internationally. Incremental reform of property laws took place over the course of the 19th and early 20th centuries. The impetus for

the reforms was a growing recognition that women were often helpless in marriage and that husbands were taking advantage of them. The intent of both the legislators and reformers was not to encourage women to leave their marriages, but rather to assist them in cases where their husbands were not fulfilling the obligations of coverture, as, for example, in cases of desertion or abandonment. "When a husband defaulted upon his marital responsibilities, a married woman was authorized to obtain equivalent protection at the hands of a paternalistic legal system."⁵¹ Reform of property laws formed part of the growing recognition of women's role as mothers and the need to support their maternal role for the betterment of children and society at large.

Constance Backhouse identifies three waves of reform of married women's property laws in English Canada. The first phase, which took place during the 1850s and early 1860s, was designed "to provide temporary relief for families in crisis."⁵² The second wave of legislation, enacted across Canada between 1851 and 1884, was designed to extend to all married women the rights initially granted to deserted and abandoned wives. That legislation declared that a wife's property was hers, not subject to her husband's debts. It did not, however, give women "dispositive control over their property." "The intent was to protect the property from misuse in the hands of the husband, and the assets were insulated from seizure by the husband or his creditors. The goal was to rescue at least some family assets from attachment by creditors in times of economic emergency."⁵³

The third wave, which occurred in the 1870s and 1880s, was initiated by England's enactment of the first *Married Women's Property Act* of 1870. Ontario passed similar legislation in 1872, which allowed wives to control their own "wages and personal earnings" and any profits from a business they owned. Backhouse argues that in large part this legislation was designed "to regularize creditors' rights, by subjecting married women to the same property laws that

governed everyone else."⁵⁴ This legislation was extended under *The Married Women's Property Act* of 1884, which "abolished the role of the husband as trustee over his wife's separate estate."⁵⁵

Despite these significant legal reforms, judges did not always apply property laws with enthusiasm. While they were sympathetic to the need to protect helpless wives, they had considerably more reservations about women's financial independence. As Backhouse notes, "Scornful of the legislative goals and palpably concerned about the danger that such reform measures posed for the Canadian family, the majority of judges deliberately embarked upon a campaign of statutory nullification."⁵⁶

Although the Acts did not amount to the "liberation" of women, they did represent "a radical departure from the common law concept of marital unity" and were therefore "both a potent symbol of married women's citizenship and a crucial building-block for future feminist reform."⁵⁷ It must be noted, however, that since most property was owned by men, most women remained without economic assets or power. As well, for many working class families, who held no property, the Acts were largely irrelevant. As Chambers notes, "The Married Women's Property Act of 1884, which granted wives rights over their separate property that approached those of men and single women - formal legal equality - had done nothing to address the fundamental imbalance of economic power within most marriages or to deconstruct the social belief in martial unity, male authority, and wifely obedience, to achieve more substantive equality between spouses." "Without a legal recognition of the economic value of domestic labour, most wives were denied the benefits of property ownership."⁵⁸

C. Divorce

A consideration of divorce is fundamental to any study of marriage. As Backhouse notes, "ironically, it is through an examination of divorce law that one uncovers the best evidence of how nineteenth-century Canadians viewed the institution of marriage."⁵⁹ Efforts to restrict access to divorce speak volumes about broader social and political concerns about the fragility of the institution of marriage itself. In considering the issue of divorce, we must bear in mind that, irrespective of whether judicial or parliamentary divorce were available, people managed to find ways to leave their marriage. Then, as now, divorce was not the only means of terminating a marriage. History provides evidence of countless separations (both informal and formal), of desertion, bigamy,⁶⁰ spouse murder, and suicide.⁶¹

Canadian divorce law was both rooted in and heavily influenced by British legislation and legal practice. In the U.K. prior to 1857, a petitioner seeking a divorce had to apply to Parliament for a Private Act ending the marriage.⁶² Such a procedure was costly, time-consuming, and public. Thus, the passage of England's first divorce legislation in 1857 was a significant development.⁶³ The Act was the culmination of three centuries of pressure for legislation. In simple terms, what the 1857 Act did was to transfer jurisdiction over divorce from Parliament (which had authority to pass private divorce bills) to a special court (the Court of Divorce). Under the 1857 legislation, Britain encoded an explicit double standard distinguishing between husbands and wives in their access to the grounds of divorce: while husbands could obtain a divorce on the grounds of simple adultery alone, wives had to demonstrate aggravated adultery (i.e., adultery coupled with cruelty, bigamy, etc.). This double standard remained in force in England until 1923 (and until 1925 in Canada).

Following the passage of the 1857 legislation, Britain's colonies were urged to pass their own divorce legislation. While the West Indies, Australia and New Zealand complied, Canada did not, waiting until 1968 to enact a federal divorce act. Nonetheless, Canadians did have access to divorce through other avenues, depending on where they lived. Although jurisdiction over marriage and divorce had been granted to the federal government under the *British North America Act*, section 29 of the Act granted the provinces *de facto* jurisdiction over divorce, because it provided that laws already in force at Confederation and courts of civil and criminal jurisdiction would continue. As well, existing provincial and territorial laws could continue after admission of any of new territories.⁶⁴ All three Maritime provinces had enacted divorce statutes prior to Confederation (Nova Scotia, 1758; New Brunswick, 1791; PEI, 1833)⁶⁵ and those laws, and the divorce courts established to oversee them, remained in force.⁶⁶

Grounds for divorce in the Maritime provinces varied slightly, although all were based upon matrimonial offences. Adultery was a ground for divorce in all three provinces. In addition, New Brunswick and PEI included frigidity and impotence, while Nova Scotia added cruelty to its list of matrimonial offences. No double standard was enshrined: men and women had equal access to all available grounds for divorce.

When British Columbia joined Confederation in 1871, it already had its own courts with the right to grant divorces. British Columbia's legislation was modelled on the 1857 U.K. legislation, in which the sexual double standard was enshrined. Lacking any divorce legislation or courts, residents of Ontario, Manitoba and the North West Territories had to petition Parliament for a divorce after Confederation.⁶⁷ Judicial divorce was not introduced in Ontario until 1930.⁶⁸ The passage of Ontario's *Divorce Act* brought it into line with laws in Alberta, British Columbia, Manitoba, Northwest Territories, Saskatchewan and the Yukon. Until the federal

government enacted its *Divorce Act* in 1968, residents of Quebec and Newfoundland could obtain a divorce only through a Private Act of Parliament.⁶⁹

While divorce was available in most constituencies, it remained a rare occurrence until well into the 20th Century. Indeed, efforts to reform divorce legislation in Canada were lacklustre at best. This was because of ongoing, widespread concerns about the moral pathology that divorce was seen to represent. As James Snell notes, "The United States offered a frightening example of immorality run rampant as divorce reform was piled on divorce reform. In Canada, by contrast, divorce was difficult, and a 'healthy attitude' was evinced by a refusal to welcome divorced persons into social circles."⁷⁰ For Canadians, "Divorce was intolerable because of the crucial role of marriage in the family structure. To treat divorce as a possible response to an unsuccessful marriage not only undermined the foundation of the family structure, but challenged the validity of the idealized notion of the family. Divorce was threatening because it drew attention to the gap between the ideal of the conjugal family and the reality of everyday life."⁷¹

Throughout the period under consideration in this section, both the Roman Catholic and Anglican churches remained steadfastly opposed to divorce on any grounds. (Indeed, the Roman Catholic Church continues to oppose divorce today). While other "major denominations showed some flexibility" on the matter, they were not able to turn the tide in the debates.⁷² Thus, "[a] serious debate over divorce and all the issues that debate entailed was strangled by a simplistic reaction in support of the dominant ideal of the family and marriage and by the authority that the ideal commanded in Canadian society. Most Canadians were unwilling to reconsider the fundamental issues involved in divorce, preferring to cling tightly to the sure and steady rock of the ideal of the conjugal family."⁷³ Even feminists stopped short of seeking

greater access to divorce. Instead, as Backhouse notes, feminists chose "to demand fairer relations within marriage" and the removal of the sexual double standard in access to divorce.⁷⁴

D. Child Custody and Access

Although adults are clearly the focus of the Law Commission's study of close personal relationships between adults, we cannot ignore the role of children in adult relationships. Indeed, one of the primary purposes of marriage and family law has been to promote and encourage procreation within the conjugal family. Thus, it is imperative that we consider the fate of children both within "intact" families and following the dissolution of their parents' marriages.

Contrary to the popular perception of the universality of the "maternal presumption" (i.e., all things being equal, mothers should be granted custody of their children because they are the ones best suited to care for their children), until the late 19th century, fathers in fact had virtually unlimited rights to custody of their legitimate minor children. Under British Common Law, the family operated with strict hierarchical and patriarchal standards. Just as wives had no legal rights to their property or person, so children were essentially the property of their fathers, to be protected or dispensed with as their fathers saw fit. (They could, for example, be sold or traded into domestic service or apprenticeship). These custody rules served as a powerful disincentive for women who might contemplate leaving a marriage, however unsatisfactory the relationship might be, as mothers were entitled to neither custody of nor access to their children. Not surprisingly, then, 19th century feminists were vigorous in their campaigns to win custodial and access rights to their children in the event of the dissolution of their marriage. Indeed, along with property rights and suffrage, family law reform was a major feminist campaign in the late 19th and early 20th centuries.⁷⁵

The shift away from fathers' automatic rights to custody began to take place slowly during the 19th century, as a result of both feminist lobbying efforts and the enormous social and economic changes wrought by industrialization. As notions of the maternal instinct and the gendered division of labour began to gain wider currency during the 19th century, and as concern grew over issues of the declining birth rate among white, middle class women,⁷⁶ and the health and well-being of the nation's children, feminist arguments about mothers' entitlement to child custody slowly began to win the day.

Changes to custody laws took place incrementally throughout the 19th and early 20th centuries. The rationale for this shift was "the tender years doctrine." The assumption was that for very young children, the nurturing care of a mother provided the optimum environment. Beginning with children under the age of 7,⁷⁷ and gradually extending up to 12, and finally the age of majority, revised legislation extended women's rights to custody of their children, to equal those of fathers.⁷⁸ By 1925, the principle of formal legal equality between parents had been entrenched in family law in Britain and North America,⁷⁹ a principle that still applies in custody and access disputes today.

Changes in custodial legislation did not represent a recognition of women's rights. Rather, it reflected the broad consensus in society of children's need for the care and protection that it was believed only mothers could provide. As I will demonstrate in the following section, not all mothers were deemed to be fit to provide such protection.

E. The Treatment of Single Mothers and Illegitimate Children

As I have noted above, a fundamental purpose of marriage has historically been to provide a legal and religious framework to support the reproduction and care of children. Until

recently, the only socially and legally sanctioned unit for procreation was the heterosexual nuclear family united through legal marriage. Numerous forms of support ranging from the church (which welcomed children to the community of God through sacraments such as baptism) to the laws of inheritance were provided to families and their children. These supports were inextricably tied to legitimate status of the children, a status that could only be achieved through marriage.

As I will demonstrate in this section of this paper, legislation and social policies provided little financial aid for single mothers, lest such assistance be seen as an encouragement for divorce or "unwed" motherhood. Furthermore, severe sanctions awaited those who dared to reject marriage and the dual-parent family. Their children were deemed illegitimate and faced shame through community shunning; even the terminology used to define such children (bastard) was designed to discourage pregnancy and birth outside of marriage. In light of the fact that both abortion and birth control were illegal under the 1892 Criminal Code, such sanctions served as a severe disincentive to sexual relations outside of marriage.

One method of endorsing the social norm of procreation within the conjugal unit was to differentiate sharply between "good" and "bad" single mothers. A mother who had entered lone parenthood through the death of her husband was deemed to be worthy of state support. Women who had achieved that status through divorce or desertion, or through pregnancy outside of marriage, were ineligible for support, whether social or financial.

While there have always been single mothers -- widows, abandoned wives, and "unwed" mothers -- their numbers grew during the First World War. Widows of men killed on the battlefield were to be pitied and supported (if reluctantly) by the burgeoning state bureaucracy of the post-war period. While feminist organizations had been lobbying for mothers' pensions for

decades, their efforts achieved success with the passage of Mothers' Allowance legislation across the country during the 1920s. The legislation provided a tiny amount of financial support, and included highly restrictive eligibility criteria (e.g., initially being available only to widows, not to deserted or divorced women or single mothers). Recipients were subjected to close moral scrutiny, and were actively encouraged to remarry as soon as possible in order to establish a "normal" home life for their children.⁸⁰

In a recent article, Lori Chambers argues that in Ontario "the state rewarded conformity rather than explicitly punishing non-marital cohabitation."⁸¹ Thus, in 1921, for example, Ontario passed the *Legitimation Act* which stipulated that if the parents of an illegitimate child married, then the child would automatically be deemed to be legitimate. Where marriage was not possible, social service agencies encouraged women to give up their children for adoption, rather than raise them as single mothers. Both of these mechanisms, then, were designed to encourage marriage, reproduction, and raising children within the heterosexual conjugal unit.⁸²

F. Other Policies to Support the Conjugal Family

In addition to the areas I have detailed above, many other policies and laws were implemented to sustain the conjugal family. In response to pressure from middle class women's groups, for example, governments instituted measures to import foreign domestic servants, and to train working class Canadian "girls" in the domestic sciences. In this way, government programmes enabled middle class women to hire a servant to help them with household and child care responsibilities. With the exception of the World Wars, when women's labour power was needed to replace men fighting overseas, married women were discouraged (and sometimes prohibited) from participating in the paid labour force. Severe limits were placed on women's paid employment and in particular on married women's employment. The rapid

expansion of the federal civil service during the first two decades of the 20th Century, and the accompanying influx of young female office workers caused concern for male bureaucrats, who feared the presence of women "would deter bright young men from pursuing careers in government." Through a series of restrictions on female employment, by 1921 "women were virtually excluded from all permanent positions in the federal bureaucracy." Female civil servants who married were immediately required to submit their resignations. Similar regulations affected elementary and secondary school teachers as well.⁸³ While legislation excluding married women from employment was never passed, one such law was proposed in the Quebec legislature during the Depression, on the grounds that married women caused unemployment.⁸⁴ Immigration policies encouraged the immigration of conjugal families through sponsorship programmes that enabled male breadwinners to bring their wives (and children).⁸⁵

Furthermore, a host of benefit policies were enacted over the course of the 20th Century which were tied to the heterosexual married family. Some, such as Federal income tax legislation, enacted for the first time in 1917, provided a tax exemption for married couples double that which was available to single people.⁸⁶ Others such as the Canada Pension Plan and the Old Age Security programme provided spousal allowances. Despite the sweeping social and familial changes that have taken place during the 20th Century, many of these provisions remain in force in areas as wide-ranging as taxation, pensions, and property.

III. The Sea Change: 1968 to 2000

Although marriage and the family are constantly evolving, the pace of that change has increased dramatically since the 1960s. As Jillian Oderkirk noted, "From the beginning of Canada's colonial period until the 1960s, most Canadians viewed marriage as a lifetime

commitment, and the only circumstances under which a couple could live together and raise a family. In the past twenty-five years, however, attitudes towards marriage have changed profoundly. Marriage is no longer necessarily a lifetime commitment, as a large minority of couples now divorce.⁸⁷ These changes are particularly evident in the area of family law. As Julien and Marilyn Payne noted: "It can safely be said that no other field of law has undergone such radical change."⁸⁸

Dramatic changes to women's status within marriage and the family began to take place in Canada in the 1960s. The growth of the women's movement in the 1960s and 1970s provided a key force in lobbying for legal changes in women's subordinate status within marriage. The legalization of birth control and abortion, women's increasing economic independence through their rapidly increasing labour force participation, and the passage of liberalized divorce legislation, are among the key social, legal, and political developments of the past four decades. Each of these had a significant impact upon the institution of marriage. The development of the birth control pill and the legalization of birth control and abortion, for example, meant that for the first time in history women could control their fertility, determining when and indeed if they would have children. Acquiring this reproductive freedom has had two major effects: women began having fewer children, and they could begin to consider the possibility of separating heterosexual sexual activity from pregnancy. These developments, coupled with the liberalization of divorce, meant that women had much greater choice about how they could live their lives.

This section of the paper will examine developments which took place in the following areas: marriage (including common-law and same-sex relationships); property laws; divorce; child custody and access; and the treatment of single mothers and illegitimate children.

A. Marriage and Common-law Relationships

During the past thirty years, Canada has witnessed an increasing diversity in domestic and family relationships. The dramatic increase in the number of common-law unions, both heterosexual and same-sex, the marked increase in the number of children born to single women and to common-law couples, both heterosexual and same-sex, are but two of these developments.

1. Marriage

(a) Demographic changes

Marriage and the family have been affected by tremendous demographic changes during the three decades since the passage of the *Divorce Act* in 1968. As the rate of divorce has increased, remarriages have become increasingly popular. In the 1950s and 1960s, 90 per cent of marriages involved single persons, while less than 10 per cent of participants were widowed or divorced. By 1991, only 75 per cent of marriages involved single persons; approximately 20 per cent of participants were divorced. Among other demographic changes are the following:⁸⁹ a decline in average duration of marriage; an increase in number of dual income families; an increase in life expectancy, with the result that married couples enjoy a much longer period of time together after their children leave home;⁹⁰ smaller families;⁹¹ and an increase in the number and percentage of common-law unions.⁹²

(b) Legal changes

In 1990, Parliament passed the *Prohibited Degrees Act*,⁹³ which "prohibits marriage only between those related lineally by consanguinity or adoption, as brother and sister by consanguinity, whether by whole blood or half-blood, or as brother or sister by adoption. Other related persons, e.g., an uncle and niece, or a step-father whose marriage has ended by death

or divorce and his step-daughter, are now free to marry."⁹⁴ Apart from the prohibited degrees enumerated in the 1990 Act, the common law prevails (except in Quebec where the Civil Code applies). Law professor Martha Bailey describes the 1990 Act as "an example of an explicit removal of religious values from the law of marriage,"⁹⁵ since most of the prohibitions that were abolished had their roots in religious tradition and law.

2. Common-law relationships

During the 1980s and 1990s, *de facto* or common-law marriages emerged as both a "social issue" and a rapidly growing demographic fact. This occurred in part because common-law relationships were included on the 1981 and 1986 census questionnaires for the first time.⁹⁶ People living in common-law unions had previously been recorded as living with non-family members. In the 1981 and 1986 Census, these responses were folded into the total number of married couples. The 1984 Family History Survey, which was sent to 14,000 respondents, went further than the census, in asking for information about previous as well as current marital arrangements (including common-law arrangements).⁹⁷ Data from the 1984 survey indicated that "16.5% of adult Canadians between the ages of 18 and 65 had at one time or another lived in a marriage-like union." That figure rose to 22 per cent when the population of those between 20 and 24 was considered.⁹⁸ In 1991, common-law unions were counted separately for the first time. That year, 1,534,000 common-law unions were reported.⁹⁹ By 1995 Statistics Canada reported that 2 million people or one in seven Canadian couples were living in a common-law relationship.¹⁰⁰

The data reveal significant provincial variations. A 1988 article reported that Quebec had a cohabitation rate of 15.5 per cent, which was the highest in the country.¹⁰¹ By 1991 that figure had risen to 19 per cent of all Quebec couples, "more than double the proportion in all other

provinces combined."¹⁰² By 1996, the Vanier Institute reported that Quebec continued to have the highest proportion of couples living common law at 24 per cent.¹⁰³

It is important to remember that these figures represent a virtual sea change in intimate relationships. While married couples still predominate, they are now joined by a significant number of heterosexual common-law couples. While not viewed with equal enthusiasm in all quarters, common-law relationships have become increasingly accepted -- a far cry from the negative attitudes towards "shacking up" in the 1950s. Furthermore, the growth of common-law couples has been accompanied by numerous legal challenges and the gradual elimination of most of the distinctions between married and common-law couples.¹⁰⁴

3. Same-Sex Relationships

Because Statistics Canada has not, to date, included same-sex relationships on the Census questionnaire, no accurate count exists of lesbian and gay couples in Canada. Estimates of the number of same-sex couples vary widely. Whether same-sex couples represent 10 per cent or 3 per cent of the couples in Canada, however, their numbers are clearly too vast to ignore.¹⁰⁵ While same-sex couples will be included for the first time in the 2001 Census questionnaire, it will take some time before an accurate count is available. Despite this omission, we have seen a virtual parade of court cases in the past two decades, especially since the enactment of the Charter.¹⁰⁶ A number of these cases present a challenge to the exclusion of same-sex couples from marriage. The Civil Code in Quebec expressly restricts marriage to opposite-sex couples.¹⁰⁷ Elsewhere, the long-standing common law definition of marriage prevails, which is "the union of one man and one woman to the exclusion of all others."¹⁰⁸

In a number of cases involving same-sex couples, judges cite the procreative purpose of marriage as a primary reason for denying lesbian and gay couples the right to marry.¹⁰⁹ As increasing numbers of same-sex families include children, whether through adoption, donor insemination, or a previous heterosexual marriage, this argument becomes more and more difficult to sustain. One widely quoted source estimates the number of lesbian and gay parents as follows: "The best estimates we have today suggest that there are between 3 and 8 million gay and lesbian parents in the United States, raising between 6 and 14 million children."¹¹⁰ Canadian scholars have assumed that the proportions would be similar for Canada.¹¹¹

Same-sex marriage has posed dilemmas for the major faith groups. The United Church of Canada, while affirming the dignity of all human beings regardless of their sexual orientation, remains conflicted on same-sex marriage.¹¹² In 1997, the United Church voted to include a liturgy for same-sex union ceremonies in its service book, to be used at the discretion of individual ministers.¹¹³ The Anglican Church of Canada has also upheld the dignity of all human beings, but views homosexual sexual activity as unacceptable, and hence, does not condone same-sex marriage. Conservative Judaism makes the same distinction. Both the Roman Catholic and Anglican Churches require celibacy of their lesbian and gay members.¹¹⁴ Lesbians and gays within all the major faith groups, however, continue to lobby for both legal and religious recognition of same-sex marriage.

B. Property

Despite the reforms of late 19th and early 20th centuries, inequities in the division of marital property remained. While the reforms had given married women the right to manage and dispose of their own property and earnings in the same way as married men or single women, the regime of "separate property" did not provide any means of assessing and valuing child

care, domestic labour, or unpaid work in a family business such as a farm or ranch. In the 1970s, Irene Murdoch discovered this harsh reality when she attempted to receive adequate compensation for her share of the family ranch property when her marriage dissolved. The trial judge had ruled that Mrs. Murdoch was not entitled to a share of "her husband's property" because "what the appellant had done, while living with respondent, was the work done by any ranch wife." Under existing legislation, Mrs. Murdoch's work, which included "haying, raking, swatching, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding," and managing the ranch for five months of the year while her husband travelled, did not entitle her to a share of the property which was held in his name alone. The Supreme Court accepted that reasoning, and Mrs. Murdoch's claim was denied.¹¹⁵

The Murdoch case inspired renewed feminist lobbying for property reform for both married women and women living in common-law relationships. The post-Murdoch era did signal a growing recognition of women's contributions in the home and the financial and employment disadvantages they suffered as a result. [For more, see section on support under Divorce, below.] While the law now makes provision for marital property division in every province and territory in Canada, it applies only to married couples. Common-law couples, both heterosexual and same-sex, must still rely upon the common law doctrine of unjust enrichment or Civil Code provisions on partnerships, contracts, and unjust enrichment to resolve property disputes.

C. Divorce

Although numerous factors have contributed to the diversity of relationships and family forms, it is arguable that the single most significant factor is the widespread availability of

divorce. In a recent book on divorce, Karla Hackstaff argues that divorce affects not just those who divorce but all members of a society, because it changes how people think about marriage. Terming the change "divorce culture", Hackstaff argues that it encompasses three key beliefs: "marrying is an option, marriage is contingent, and divorce is a gateway."¹¹⁶ What is at issue, then, is not merely the number of divorces but "alternative meanings."¹¹⁷ People now see that they have alternatives to lifelong monogamous marriages. That represents a remarkable change in a relatively short period of time. We must bear in mind of course that history provides ample evidence that people have left unhappy, violent, or loveless marriages, even when the law appeared to render that impossible. All too often, the absence of divorce legislation resulted in desertion and abandonment, rather than more stable marriages, as legislators might have intended. Countless husbands left their wives and children without any means of support and the law denied them the capacity to remarry. By the mid-1960s, prior to the passage of the Divorce Act, it was estimated that some 60,000 deserted people in Canada, many of them women, were unable to obtain a divorce. Accordingly, the number of common-law unions in Canada was rising, and the children born into these relationships were deemed to be illegitimate.¹¹⁸ We should not, then, overestimate the coercive power of law and its capacity to control or prohibit marriage-leaving.¹¹⁹

1. Legislative Changes

As I have already noted, divorce reform was very late in coming to Canada. The *Divorce Act* of 1968,¹²⁰ Canada's first divorce bill, repealed all prior provincial divorce laws. The reform was the culmination of years of lobbying by a broad range of constituencies including the legal community, religious leaders, and activists in the newly emerging women's movement. Only with the passage of that Act did divorce become readily accessible in all provinces of Canada. The most significant change was included in section 4 of the Act, which added marriage

breakdown to the list of grounds for divorce. Several grounds for demonstrating permanent marriage breakdown were enumerated: alcohol and narcotic addiction; whereabouts unknown for three years; non-consummation; separation and desertion. An abandoned spouse could seek a divorce after three years; a departing spouse, after five. Section 3 of the Act retained the matrimonial offences: adultery, sodomy, bestiality, rape, homosexual act(s), bigamy, physical or mental cruelty.

While the Act represented a major breakthrough, problems remained, and numerous bodies, including the Royal Commission on the Status of Women and the Law Reform Commission of Canada recommended substantial reforms of the *Divorce Act*¹²¹. Many suggested that marriage breakdown should be the only basis for divorce. Reforms were brought forward in the *Divorce Act* of 1985.¹²² Under the new Act, marriage breakdown was the sole ground for divorce. A petitioner could prove marriage breakdown in one of two ways: separation of not less than one year or commission of a matrimonial offence: adultery, or physical or mental cruelty. Subsequently, the vast majority of divorces were obtained on the basis of separation for at least one year.¹²³

2. Support and corollary relief

For the first time, the 1968 *Divorce Act* established national criteria for "corollary relief" including spousal and child support where those were included in the divorce. If matters of support or custody arose during the divorce proceedings, then they fell under federal jurisdiction; if they were separate or independent of the divorce, then they fell under provincial jurisdiction.

A 1992 case examined the issue of the non-monetary contributions of wives to the family economy and economic disadvantage that wives often suffer as a result of years devoted to child rearing.¹²⁴ Mrs. Moge sought a variation in the support order that had been based on the presumption of her ability to achieve financial independence. Writing for the majority in the case, Justice L'Heureux-Dubé observed:

To elevate economic self-sufficiency to the pre-eminent objective would be inconsistent not only with the proper principles of statutory interpretation, but also with the social context in which support orders are made. There is no doubt that divorce and its economic effects are playing a role in the feminization of poverty in Canada. In most marriages, the wife still remains the economically disadvantaged partner.¹²⁵

Justice L'Heureux-Dubé explicitly rejected the established test, enunciated in the 1987 support trilogy,¹²⁶ a test that emphasized self-sufficiency and a clean break upon divorce.

3. Divorce rates

Not surprisingly, divorce rates in Canada rose dramatically following the passage of the 1968 *Divorce Act*.¹²⁷ An even greater increase occurred following the passage of the 1985 Act. Analysts speculate that the dramatic increase following the 1985 legislation was the result of people waiting to divorce until the new rules came into effect. The number of divorces peaked in 1987, at 96,200, and has declined ever since.¹²⁸ The decline is due to the lower marriage rate, the increase in number of legal separations, and the increased prevalence of common-law unions. Today an estimated one in three marriages in Canada now ends in divorce.¹²⁹ This stands in contrast to the United States where the rate is closer to one in two.

4. Divorce and the Major Faith Groups

Since the 1960s, major Canadian religious groups have granted more liberal dissolutions of marriage. The United Church of Canada was the first denomination to agitate for reforms to

divorce laws: in 1966, it urged the government to recognize marital breakdown as sufficient grounds for divorce.¹³⁰ At the General Conference in 1968, Church leaders recognized the right both to divorce and remarry. The Roman Catholic and Anglican Churches also began to institute reforms during this time period. The Second Vatican Council (1962-65), for example, approved changes that would allow easier access to annulment (the only method of dissolution of a marriage except for death of one of the spouses). As a result of Vatican II, the number of annulments rose and the stigma of both mixed marriages (between Catholics and non-Catholics) and remarriage became less glaring.¹³¹ The Anglican Church's position on divorce began to shift following the 1963 World Wide Anglican Congress in Toronto. Following the passage of the *Divorce Act* in 1968, there was a relaxation of the Church's ban on divorce, and the allowance of remarriage.¹³² Finally, both Orthodox and Reform Judaism have made reforms to their policies on marriage and divorce. Jewish feminists lobbied for the acceptance of female-initiated divorce, even in the Orthodox community. Civil law can now be invoked in the event that a husband refuses to authorize the writ of divorce required within the Jewish faith.¹³³

D. Child Custody, Access, and Child Support

In contrast to the United Kingdom, where parental status is explicitly tied to marriage,¹³⁴ in Canada, parental status and marital status are not similarly linked. Issues related to child custody, access, and support can be included as part of divorce proceedings if the issue is raised at that time; otherwise, they fall under provincial jurisdiction.

In the past decade, a number of changes have taken place in the realm of child custody, access, and child support. The implementation of federal child support guidelines, the removal of income tax from child support payments, and the Report of the Joint Senate/Parliamentary Committee on Child Custody and Access are but three of these developments.

E. The Treatment of Single Mothers and Illegitimate Children

During the 1970s and 1980s, many provinces in Canada enacted legislation to remove the distinction between children born in wedlock and children born out of wedlock. Subsection 1(4) of Ontario's *Children's Law Reform Act* (1978), for example, states that "Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section."¹³⁵ Alberta, Newfoundland, Nova Scotia and Saskatchewan have retained the distinction between legitimate and illegitimate children. Alberta is the only province whose child support legislation excludes illegitimate children.

In 1994, Statistics Canada reported that the proportion of non-marital births was six times higher than in 1961. The increase is due largely to the emergence of common-law unions as an alternative to marriage. By far the highest proportion of births outside marriages occur in Quebec. This is, of course, not surprising since Quebec has the highest number of common-law couples.¹³⁶ As common-law relationships have become an increasingly prevalent lifestyle, the stigma associated with such unions and with birth outside of marriage has gradually diminished. Without a doubt, that is a beneficial development for children born to these women and men.

III. 2001 and Beyond

It can safely be said that the history and evolution of marriage and the family is a story of both "change and continuity."¹³⁷ As well, it is a story of increasing choice as to how people organize their intimate lives. Today, the nuclear, male-breadwinner family is no longer the norm, having been replaced by the dual-income family and joined by a growing number of single-

parent families. Yet, many policies are still based on that model, as if it were the only legitimate one. Myriad laws and policies are still tied to marriage and to close personal relationships between adults. There are over 1800 federal statutory provisions where terms dealing with close personal relationships between adults appear (not counting the *Income Tax Act*). The *Modernization of Benefits and Obligations Act* identified over 60 laws where terms such as husband, wife, and marriage are used.

History has shown us that, despite state efforts to control and regulate marriage and the family, many people have chosen, for a wide range of reasons, to live outside of the boundaries of the heterosexual nuclear family. Despite the absence of divorce legislation prior to 1968, countless men and women left unhappy marriages, often forming new - albeit extra-legal - relationships. Despite community disapproval, widespread discrimination, and legislative discouragement, inter-racial couples married and raised children. Lesbians and gay men formed long-term relationships, many of which included children, despite the absence of social support and legal protections. All of these people have found love and support within families that historically have received little recognition. As I have documented, however, over the course of the past three decades, legislative change has slowly adapted to these demographic realities. Increasingly, the law has assisted and supported people in forming their intimate partnerships and, when necessary, in leaving relationships. These legislative changes, far from causing the collapse of the family, have in fact assisted in the formation of thousands upon thousands of Canadian families.

Despite the enormous changes that I have documented in this report, continuity also remains a theme. Most Canadians still marry and virtually everyone lives in some form of family. These facts provide ample evidence that the family and close personal relationships continue to perform important functions in people's lives. Furthermore, when we examine these changes in

a dispassionate manner, we can see that, irrespective of the marital status or gender of the partners, the actual contours of individual relationships are remarkably similar. Despite moral and religious concerns voiced in the 1960s and '70s, for example, heterosexual common-law relationships increasingly resemble heterosexual marriages, demonstrating a degree of commitment and longevity not anticipated by social commentators of earlier decades. While such relationships still appear to be less stable than heterosexual marriages, they are clearly not merely casual "affairs."¹³⁸ Many common-law couples today raise children, and care for one another in times of illness and personal difficulties, often into old age and death. In recognition of these changing social trends, during the past two decades, courts and legislatures have removed many of the legal distinctions between married and common-law couples (both same and opposite-sex). Furthermore, there is mounting evidence to demonstrate that lesbian and gay relationships increasingly include children, both from previous heterosexual relationships and through donor insemination and adoption. While no statistics are available, lesbian and gay relationships also appear to be comparable in longevity, stability, commitment and devotion to heterosexual common-law relationships. This is a notable finding given the ongoing discrimination and lack of social and financial supports faced by these families.

In sum, despite the enormous social, legal, and political changes that I have documented in this report, most Canadians continue to live in families. Most Canadians get married and increasing numbers of those who were barred from marriage are seeking access to the institution of marriage. As the debate over same-sex marriage dramatically illustrates, marriage continues to hold enormous symbolic significance in contemporary society. Whether they are demanding the right to be included in the institution of marriage or fighting to exclude others, advocates on both sides of the divide view marriage as a symbol of social and cultural acceptance and recognition.

The history that I have examined in this paper demonstrates that many benefits and responsibilities have traditionally been tied to marriage and the conjugal family. Over the course of the past three decades, many of those have been disentangled from marriage and/or extended to common-law and same-sex couples. However, as numerous reports and studies have demonstrated, many policies remain intertwined with marriage, whether by design or omission. Furthermore, the enormous symbolic importance remains: the feeling of being a citizen with full access to all the rights and responsibilities of citizenship; the meaning that can be attached to having one's relationship recognized publicly, in the community, by law. As Justice L'Heureux-Dube noted in her dissent in *Egan v. Canada*, "Official state recognition of the legitimacy and acceptance in society of a particular type of status or relationship may be of greater value and importance to those affected than any pecuniary gain flowing from that recognition."¹³⁹

The symbolic importance of marriage may hold significance for the children of these relationships as well, given their need for a sense of stability, security, and acceptance by the broader society. Indeed, if the purpose of family law is in part to sustain and support committed long-term relationships, both with and without children, then arguably full recognition of common-law and same-sex relationships would represent a further step in this direction.

ENDNOTES

- ¹ Senator Robert Gowan, Senate Debates, 28 February 1888, 58-9. Cited in Christina Burr, "Letters to Mike: Personal Narrative and Divorce Reform in Canada in the 1960s," in *Family Matters: Papers in Post-Confederation Canadian Family History*, ed. Lori Chambers and Edgar-Andre Montigny (Toronto: Canadian Scholars Press, 1998), 411.
- ² E.A. Lancaster, Conservative MP, for Lincoln Ontario (1900-1916), Commons Debates, LXII, 4 (1905), 6276, 6283, 6347-49, 6357. Cited in James Snell, "The White Life for Two: The Defence of Marriage and Sexual Morality in Canada, 1890-1914," *Histoire Sociale/Social History* 16 (1983), 114-115.
- ³ Canadian Youth Commission, *Youth, Marriage and the Family* (Toronto: Ryerson Press, 1948), iii.
- ⁴ Youth Commission, vii.
- ⁵ James G. Snell, "The White Life for Two: The Defence of Marriage and Sexual Morality in Canada, 1890-1914," *Histoire sociale/Social History* 16 (1983), 112.
- ⁶ James G. Snell, *In the Shadow of the Law: Divorce in Canada, 1900-1939*, (Toronto: University of Toronto Press, 1991), 22. The quotation is from G.S. Holmsted, "The Marriage Laws of Canada," *Canadian Law Review* 2 (1903), 527.
- ⁷ R.W. Gordon, "Critical Legal Histories", *Stanford Law Review* 36 (1984), 109, cited in Snell, *In the Shadow of the Law*, 7.
- ⁸ Snell, *In the Shadow of the Law*, 28.
- ⁹ Snell, *In the Shadow of the Law*, 22.
- ¹⁰ William Blackstone, *Commentaries on the Laws of England: Book the First* chapter 15, (1765), 430, 433.
- ¹¹ Snell, *In the Shadow of the Law*, 24.
- ¹² For a discussion of the family economy in Europe, see Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge: Cambridge University Press, 1988), 364-7.
- ¹³ Snell, *In the Shadow of the Law*, 30.
- ¹⁴ Ward defines this period as extending from the 1780s to the end of the First World War. Peter Ward, *Courtship, Love, and Marriage in Nineteenth-Century English Canada* (Montreal and Kingston: McGill-Queen's University Press, 1990), 5.
- ¹⁵ *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c.3, s.91 (26).
- ¹⁶ *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3., s. 92(12). The meaning of that section was examined in a 1912 case before the Supreme Court of Canada. The Court held that the authority of "solemnization" was sufficiently broad to prohibit the federal government from enacting marriage legislation that might affect marriage ceremonies.
- ¹⁷ Peter Ward, *Courtship, Love and Marriage in Nineteenth-Century English Canada* (Montreal: McGill Queen's, 1990), 31.
- ¹⁸ *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130, 35 L.J.P. & M. 57.
- ¹⁹ See *The Marriage Reference Act*, for a full discussion of these procedures: In the Matter of the Authority of the Parliament of Canada to Enact a Proposed Measure Amending "The Marriage Act" [Reference re Marriage Act (Canada)] (1912), 46 S.C.R., 175. In Quebec, since all marriages must be recorded in the parish records, any official who was authorized to solemnize a marriage had to be authorized to keep registers of civil status.

- 20 Andrée Lévesque, *Making and Breaking the Rules: Women in Quebec, 1919-1939* (Toronto: McClelland and Stewart, 1994), 13.
- 21 English civil law was officially introduced into Upper Canada in 1792. (1792) "An Act Introducing the English Civil Law into Upper Canada," 32 Geo. III, c. 1, s. 3. For an excellent discussion of marriage laws in 19th Century Ontario, see Annalee E. Lepp, "Dis/Membering the Family: Marital Breakdown, Domestic Conflict and Family Violence in Ontario, 1830-1920," Ph.D. thesis, Department of History, Queen's University, 2001. I have relied heavily on her chapter on the contract of marriage for this section of the paper. See her thesis for full citations. I am very grateful to Annalee for providing me with portions of her thesis.
- 22 Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), 103-4.
- 23 *Lord Hardwicke's Act*, (1753) 26 Geo. II, c. 33.
- 24 Michael Grossberg, *Governing the Hearth*, 66.
- 25 Lepp notes that a secular alternative to the reading of the banns was a marriage license, which could be purchased from a government authorized issuer of licenses. This procedure, instituted in 1798, remained controversial throughout the 19th Century. Since civil marriages were not available, the couple would still be required to have their marriage solemnized by an official of an authorized religious institution.
- 26 In Upper Canada, Roman Catholic representatives were allowed to solemnize marriages under the *Articles of Capitulation* (1760), the *Quebec Act* (1774), the *Constitution Act* (1791), and subsequent legislation.
- 27 The legislation was a controversial one; it would be two years before it received royal assent.
- 28 "An Act to extend the Provisions of the Marriage Act of Upper Canada to Ministers of all denominations of Christians," 10 & 11 Vict., c. 18. (1847)
- 29 (1857) "An Act to amend the Laws relating to the solemnization of Matrimony in Upper Canada," 20 Vict., c. 66.
- 30 Lepp, 51. "An Act respecting Offences relating to the Law of Marriage." Revised Statutes of Canada 1886, Vol 2. Chapter 161, for example, established penalties for anyone who unlawfully solemnized a marriage or procured an unlawful solemnization. The act also made bigamy a felony punishable by 7 years imprisonment.
- 31 Grossberg, *Governing the Hearth*, 103.
- 32 James G. Snell and Cynthia Comacchio Abeele, "Regulating Nuptiality: Restricting Access to Marriage in Early Twentieth-Century English-Speaking Canada," *Canadian Historical Review* 69, 4 (1988), 468.
- 33 Snell and Abeele, 468.
- 34 Snell and Abeele, 469-70. On eugenics, see Angus McLaren, "The Creation of a Haven for 'Human Thoroughbreds': The Sterilization of the Feeble-Minded and the Mentally Ill in British Columbia," *Canadian Historical Journal* 67 (June 1986), 127-50, and *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: McClelland and Stewart, 1990).
- 35 See Snell and Abeele, "Regulating Nuptiality," for details of this legislation. Under common law, the minimum age for marriage was twelve for females and fourteen for males. That age was raised to fourteen for both sexes under the 1896 Marriage Act. (1896) 59 Vict., c. 39, s. 16.
- 36 Snell and Abeele, 477
- 37 Snell and Abeele, 479

38 Snell and Abeele, 485

39 Anne McGrath and Winona Stevenson, "Gender, Race, and Policy: Aboriginal Women and the State in Canada and Australia," *Labour/le travail* 38 (Fall 1996), 45-6, cited in Annalee Lepp, 38.

40 While the judicial decision in *Connolly v Woolrich* confirmed the validity of one such marriage between a Cree woman and an English fur-trader, by the latter part of the 19th century, such recognition was increasingly difficult to obtain. See Connie Backhouse, *Petticoats and Prejudice*, for a detailed discussion of these cases. *Connolly v Woolrich* and Johnson et al. (1867) 11 L.C. Jur. 197. Justice Monk's decision in *Connolly* was rendered obsolete in 1885 by the decision in *Meadows*, another case involving a First Nations woman and a white fur trader. In this case, the majority of the court dismissed the validity of the mixed marriage celebrated à la façon du pays.

41 "White Girl and Big Negro Deported at Sarnia. Had Lived Together, Though Not Married For Three Years," *Toronto Globe*, 5 April 1913. Cited in Lepp, 96 and fn. 166.

42 Lepp, 58. Several reports, including one provided by Susannah Moodie, detailed the torture and murder of black men who sought to marry white women.

43 For an excellent discussion of inter-racial marriages, see Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999), Chapter 5.

44 See Snell and Abeele for the full citations.

45 See Snell and Abeele, 483.

46 Constance Backhouse has provided an excellent review of legislation and reform in this area: "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review* 6, 2 (1988), 211-57. For Ontario, see Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: University of Toronto Press, 1997).

47 Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: University of Toronto Press, 1997), 3.

48 Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review* 6, 2 (1988), 213.

49 Chambers, *Married Women and Property Law in Victorian Ontario*, 3.

50 It is interesting to note that, in Blackstone's view, and in that of his contemporaries, women's position under coverture was not one of disadvantage, but of privilege. Blackstone concluded, "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England." William Blackstone, *Commentaries on the Laws of England: Book the First* chapter 15, (1765), 433.

51 Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review* 6, 2 (1988), 221.

52 The first Canadian legislation in this area was passed in the Maritime Provinces, beginning in New Brunswick in 1851. An Act to Secure to Married Women Real and Personal Property Held in Their Own Right, 14 Vict. (1851), c. 24 (N.B.). Prince Edward Island enacted similar legislation in 1860. Nova Scotia brought in legislation modelled on the English precedent in 1866. See Constance Backhouse, "Married Women's Property Law," 218-19, and accompanying endnotes for full citations.

53 Backhouse, "Married Women's Property Law," 222.

54 Backhouse, "Married Women's Property Law," 241.

55 An Act respecting the property of Married Women (1884), 47 Vict., c. 19. See Chambers, *Married Women and Property Law in Victorian Ontario*, 10.

Backhouse, "Married Women's Property Law," 241.

Chambers, *Married Women and Property Law in Victorian Ontario*, 5.

Chambers, *Married Women and Property Law in Victorian Ontario*, 179.

Constance Backhouse, "'Pure Patriarchy': Nineteenth-Century Canadian Marriage," *McGill Law Journal* 31 (1986), 265-6.

Cohabitation and even bigamy were much more common practices in 19th and early 20th century "frontier" - a deserting spouse could simply move to a different state or province, and call themselves married (with no one the wiser). See Peter Ward, *Courtship, Love, and Marriage*, 21.

For a discussion of alternatives to divorce, see Michael Grossberg, *Governing the Hearth*, Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*, (Cambridge: Cambridge University Press, 1988), and Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, Mass.: Harvard University Press, 2000).

Between 1670 and 1857, women obtained only 4 of the 325 parliamentary divorces that were granted.

"An Act to Amend the Law relating to Divorce and Matrimonial Causes" 20 and 21 Victoria, C 85 (1857, 1858) Phillips makes the following claim: "One of the more important legislative developments in Europe in the 19th century was the passage of the first divorce law in England in 1857." R. Phillips, *Putting Asunder*, 412.

See Backhouse, "Pure Patriarchy," 276-7. As well, section 92 (13) gave the provinces the authority to make laws concerning "property and civil rights in the province" (which can include the division of property upon divorce, including matrimonial property and support).

Initially, Maritime Governors and Councils had the authority to grant divorces, but eventually, matrimonial courts were established to hear petitions. Those courts continued to operate after Confederation, as there were no federal courts. New Brunswick established a Court of Divorce and Matrimonial Causes in 1860. Nova Scotia followed suit in 1866. Prince Edward Island had established its own court in 1835, but it was largely inactive, and by the early 20th Century the legislation was effectively a "dead letter." Snell, *In the Shadow of the Law*, 50.

Constance Backhouse notes that all three of these "Maritime divorce statutes were a complete departure from the historical English legal tradition." Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991), 187. She suggests that they may have had their origin in the more liberal practices of the New England states, from which many of the Maritime colonists had emigrated.

Residents of Prince Edward Island were effectively in that position as well.

Divorce Act (Ontario) S.C. 1930, c. 14. This Act effectively mirrored the 1857 English Matrimonial Causes Act. Matrimonial Causes Act, 1857, (20-21 Vict., c. 85), as modified by the Divorce Act, S.C. 1925, c. 41.

French law, transported to Quebec, did not allow divorce. The Civil Code of Lower Canada (1865) stated that, "Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble." Civil Code of Lower Canada 29 Vict. (1865) c. 41, art. 185. Cited in Backhouse, *Petticoats and Prejudice*, 166.

Snell, *In the Shadow of the Law*, 35.

Snell, *In the Shadow of the Law*, 33.

Snell, *In the Shadow of the Law*, 41.

Snell, *In the Shadow of the Law*, 47.

- 74 Constance Backhouse, *Petticoats and Prejudice: Women and the Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991), 179. Nellie McClung began to lobby for liberalized divorce in the 1920s and 1930s.
- 75 For an excellent discussion of child custody law in 19th Century Canada, see Constance Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law," in David H. Flaherty, ed. *Essays in the History of Canadian Law* vol. 1 (Toronto: University of Toronto Press, 1981), 212-48. See, also, Katherine Arnup, "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada," *Canadian Journal of Women and the Law* 3, 1 (1989), 18-32, upon which this section of the report draws.
- 76 Contemporary observers, ranging from social reformers to politicians to members of the Women's Christian Temperance Union, expressed concerns about the declining population among the Anglo-Celtic middle classes. Terming these concerns "race suicide," observers feared that the "founding" population of white, Anglo Saxons would be "over-run" by immigrants, who, they claimed had a much higher birth rate. Hence, they encouraged women to embrace their maternal duty. See Mariana Valverde, "'When the Mother of the Race is Free': Race, Reproduction, and Sexuality in First-Wave Feminism," in *Gender Conflicts: New Essays in Women's History*, eds. Franca Iacovetta and Mariana Valverde (Toronto: University of Toronto Press, 1992), 3-26.
- 77 In Britain, the 1839 *Custody of Infants Act* first allowed a mother to have physical custody of her children under the age of seven. The law stipulated that a mother who had committed adultery was entitled to neither custody of nor access to her children. It is important to note that judges tended to apply this legislation with great hesitation and they generally refused to exercise their discretion in favour of mothers except in the most horrific cases. Throughout the 19th Century, mothers were generally only awarded custody if they were living under the protection of an adult man such as their brother or husband.
- 78 These maternal custody rights were extended in 1855 to include children up to the age of twelve, and by the mid-1880s, the upper age limit had been removed. In Ontario, in 1887, the law removed the upper age limit and the adultery bar that had applied only to women. Under this legislation, judges were instructed to consider "the welfare of the infant," "the conduct of the parents" and the "wishes ... of the mother as of the father" in determining custody of children.
- 79 In Britain, the *Guardianship of Infants Act* (1925) "provided that no parent had a superior claim and that decisions would be made in the 'child's best interest'." Ontario passed similar legislation in 1923: *Infants Act (Amendment)*, Statutes of Ontario, c. 33. Manitoba passed similar legislation in 1921.
- 80 For a discussion of these policies, see Margaret Hillyard Little, *'No Car, No Radio, No Liquor Permit': The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998).
- 81 Lori Chambers, "Illegitimate Children and the Children of Unmarried Parents Act." In *Ontario Since Confederation: A Reader*, ed. Edgar-Andre Montigny and Lori Chambers, (Toronto: University of Toronto Press, 2000), 235.
- 82 For a detailed discussion of this legislation, see Chambers, "Illegitimate Children and the Children of Unmarried Parents Act."
- 83 For a discussion of restrictions on married women's employment, see Alison Prentice, Paula Bourne, Gail Cuthbert Brandt, Beth Light, Wendy Mitchinson, and Naomi Black, *Canadian Women: A History* (Toronto: Harcourt, Brace, Jovanovich, 1988), 224-5.
- 84 See Collectif Clio, *L'Histoire des femmes au Quebec depuis quatre siecles* (Montreal: Quinze, 1982), 255.

- 85 This provision was not available to Chinese or other Asian men. Through the notorious head tax, they were actively discouraged from bringing their wives (and children) to Canada.
- 86 See Claire Young, *What's Sex got to do with it? Tax and the "Family"* (Ottawa: Law Commission of Canada, 2000) at 26-27.
- 87 Jillian Oderkirk, "Marriage in Canada, Changing Beliefs and Behaviours, 1600-1990," *Canadian Social Trends* (Summer 1994), 7.
- 88 Julien D. Payne and Marilyn A. Payne. *Introduction to Canadian Family Law* (Scarborough, Ontario: Carswell, 1994), 6.
- 89 For these and other statistics on the family, see Vanier Institute of the Family, *Profiling Canada's Families II* (Ottawa: Vanier Institute of the Family, 2000).
- 90 In 1996 Census: 35% of all families were married couples without children, a figure that includes both childless couples and those whose children have left home.
- 91 This is the result of an increase in the number of two-person families, a decrease in the number and proportion of large families, and a decline in the birth rate.
- 92 In 1996, 86.5% of all conjugal unions were married couples; 13.5 % were common-law couples.
- 93 An Act respecting the laws prohibiting marriage between related persons (Marriage Prohibited Degrees Act), Statutes of Canada (1990), Vol. 11, Chapter 46. The Act states that: No person shall marry another person if they are related (a) lineally by consanguinity or adoption; (b) as brother and sister by consanguinity or adoption; or (c) as brother and sister by adoption.
- 94 Martha Bailey, *Marriage and Marriage-Like Relationships* (Ottawa: Law Commission of Canada, 1999), footnote 30.
- 95 Martha Bailey, *Marriage and Marriage-Like Relationships*, 17.
- 96 Although common-law relationships were included in the census questionnaire, their responses were folded into the total number of married couples. Census analysts did try to separate out the common-law couples in the 1981 and 1986 census but their calculations (such as the ones used on Craig McKie's article, cited in note 82 below) were based on inference, because common-law couples had been directed in 1981 and 1986 to report themselves as married.
- 97 Family History Survey supplement to the Labour Force Survey, February 1984.
- 98 Craig McKie, "Common-Law: Living together as husband and wife without marriage," *Canadian Social Trends* (Autumn 1986), 39-41.
- 99 Francois Nault and Alain Belanger, "The Decline in Marriage in Canada, 1981 to 1991," Statistics Canada: Health and Vital Statistics Data Section, July 1996, 18-21.
- 100 This number was calculated using the Census and the 1995 General Social Survey. See Pierre Turcotte and Alain Belanger, "Moving in Together: The formation of first common-law unions," *Canadian Social Trends* 47 (Winter 1997), 7-9.
- 101 Pierre Turcotte, "Common-Law Unions: Nearly Half a Million by 1986," *Canadian Social Trends* (Autumn 1988), 35-39.
- 102 The authors also reported that 8% of all Quebec couples were common-law in 1981 and 19% in 1991. Jo-Anne Belliveau, Jillian Oderkirk and Cynthia Silver, "Common-law unions: The Quebec Difference" *Canadian Social Trends* (Summer 1994), 9.
- 103 Vanier Institute of the Family, *Profiling Canada's Families II*, (Ottawa, 2000), 37.
- 104 See, in particular, *Pettkus v. Becker* 19 R.F.L. (2d) 165, [1980] 2 S.C.R. 834; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

For a discussion of this issue, see Kathleen Lahey, "Counting Queers," in *Are We Persons Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999); Martha Bailey, *Marriage and Marriage-Like Relationships*, 67; Katherine Arnup, "Still Hidden in the Household," paper presented at the annual meeting of the Canadian Lesbian and Gay Studies Association, 1995 and "Counting Us Out: Same-Sex Households and the Canadian Census," paper presented at the Annual Meeting, Canadian Law and Society Association, University of Ottawa, June 2, 1998.

Re: North and Matheson (1974), 20 RFL 112, 52 DLR (3d) 280 (Man. Co. Ct.); *Layland v. Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.); *Egan v. Canada*, [1995] 2 S.C.R. 513; *M v H* (1999), 46 R.F.L. (4th) 32 (S.C.C.).

Civil Code of Quebec, S.Q. 1991, c. 64 article 365 "Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent."

For discussion of this definition and legal attempts to challenge it, see EGALÉ, "Division of Powers and Jurisdictional Issues Relating to Marriage" (Ottawa: Law Commission of Canada, 2000) at 39-40.

Layland v. Ontario (1993), 14 O.R. (3d) 658 (Div. Ct.) The majority noted that "It is true that some married couples are unable or unwilling to have children, and that the incapacity or unwillingness to procreate is not a bar to marriage or a ground for divorce. Despite these circumstances in which a marriage will be childless, the institution of marriage is intended by the states, by religions and by society to encourage the procreation of children."

April Martin, *The Gay and Lesbian Parenting Handbook: Creating and Raising Our Families* (New York: HarperCollins, 1993), 6, citing Charlotte Patterson, "Children of Lesbian and Gay Parents," *Child Development* 63, 5 (1992).

See Katherine Arnup, editor, *Lesbian Parenting: Living with Pride and Prejudice* (Charlottetown: gynergy, 1995; 1997).

Michael O'Riordan, *Homosexuality and the United Church* (Toronto: McClelland and Stewart, 1990), 153-6.

Parker T. Williamson, *The Presbyterian Layman* 33, 6 (November 22, 2000). These ceremonies would, of course, have no legal standing.

Pamela Dickey Young, "The Debate over Same-Sex Relationships in Religious Traditions," paper presented at *Domestic Partnerships Conference*, Queen's University, 21-23 October 1999, 213.

Murdoch v Murdoch (1973), 41 DLR (3d) (SCC) 367, at 371

Karla B. Hackstaff, *Marriage in a Culture of Divorce*, (Philadelphia: Temple University Press, 1999), 2.

Hackstaff, 2.

House of Commons Debates, 12 May 1967, 153. Cited in Christina Burr, "Letters to Mike: Personal Narrative and Divorce Reform in Canada in the 1960s," 400, and note 33.

For an interesting discussion of this issue, see Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America* (Chicago: University of Chicago Press, 1980). May argues that people harbour an illusion that we can prevent marriage-leaving through tighter controls. What barriers to divorce may in fact accomplish is that people are forced to leave marriages, without a settlement, adequate support, or the capacity to remarry.

Divorce Act, 1968 S.C. 1967-68, c. 24. The Act came into effect on July 2, 1968.

Report of the Royal Commission on the Status of Women in Canada (Ottawa: Information Canada, 1970); Law Reform Commission of Canada, *Report on Family Law* (Ottawa, 1976).

- 122 *Divorce Act*, 1985, RSC 1985 (2d Supp.), c. 3. It came into effect on June 1, 1986. The bill was originally introduced by the Liberal government, but it died on the order paper when the election was called. It was revived by the Progress Conservatives and received Royal Assent, Feb. 13, 1986.
- 123 The Act also greatly simplified procedures to enable people (in every province except Newfoundland) to obtain an uncontested divorce without having an oral hearing.
- 124 *Moge v. Moge* [1992] 3 S.C.R. 813
- 125 *Moge v. Moge* [1992] 3 S.C.R. at 815
- 126 *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Caron v. Caron*, [1987] 1 S.C.R. 892; and *Richardson v. Richardson*, [1987] 1 S.C.R. 857.
- 127 We must bear in mind, however, in considering these data, that prior to 1969, "only very basic statistics on divorce were available on a national level." Jean Dumas, and Yves Peron, *Marriage and Conjugal Life in Canada: Current Demographic Analysis*. (Ottawa: Statistics Canada, 1992), 52. "Since 1969, the annual number of divorces is reported according to the age of the newly divorced, their matrimonial status at the time of marriage, the duration of their marriage, and so on."
- 128 The figure is taken from Vanier Institute of the Family, *Profiling Canada's Families II* (Ottawa, 2000) 52.
- 129 For an excellent analysis of divorce rates, see Anne-Marie Ambert, *Divorce in Canada: Facts, Figures and Consequences*. (Vanier Institute, 1998).
- 130 William Kilbourn, *Religion in Canada: The Spiritual Development of a Nation* (Toronto: McClelland and Stewart, 1968), 72.
- 131 Hans Mol, *Faith and Fragility: Religion and Identity in Canada* (Burlington: Trinity Press, 1985), 209.
- 132 Mol, 217.
- 133 Michael Shapiro, ed., *Divisions between Traditionalism and Liberalism in the North American Jewish Community* (UK: Edward Mellen Press, 1991), 61-3.
- 134 U.K., Children's Act (1989), c. 41.
- 135 *Canadian Family Law Guide*, Volume 1 (Toronto: CCH Canadian Limited, 1997), 7020. Similar legislation was passed in New Brunswick (1981), Manitoba (1983), Yukon (1984), B.C. (1985), Northwest Territories (1987), and Prince Edward Island (1988). Alberta, Newfoundland, Saskatchewan, and Nova Scotia have retained a distinction between legitimate and illegitimate children.
- 136 Marilyn Belle and Kevin McQuillan, "Births outside marriage: A Growing Alternative." *Canadian Social Trends* (Summer 1994), 14-17.
- 137 Anne Milan, "One hundred years of families," *Canadian Social Trends* 56 (Spring 2000), 14.
- 138 It is arguable that the relative lack of stability of these relationships may in part reflect the unequal status of common-law couples as compared with married couples (e.g. less social and community support, fewer benefits and rewards). Furthermore, it may also be the result of self-selection: that is, those who are less committed to a relationship may choose not to marry; had they married, they would perhaps have soon joined the ranks of the divorced.
- 139 *Egan v. Canada*, [1995] 2 S.C.R. 513, at para 86.

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